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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems	)	CS Docket No. 96-46
In the Matter of Telephone Company-Cable Television Cross-Ownership Rules Sections 63.54-63.58	)	CC Docket 87-266 (Terminated)

COMMENTS OF TIME WARNER CABLE

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COMMENTS OF TIME WARNER CABLE

Time Warner Cable, a division of Time Warner Entertainment Company, L.P. ("Time Warner"), hereby submits its Comments in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY.

In adopting regulations to govern the establishment and operation of Open Video Systems ("OVS"), the Commission should adhere to two principles:

- The critical need for safeguards to ensure that local exchange carriers ("LECs") are not permitted to use their expansive monopoly power in the

[1] Implementation of Section 302 of the Telecommunications Act of 1996, Notice of Proposed Rulemaking in CS Docket No. 96-46, FCC 96-99 (released March 11, 1996) ("Notice").

telephony business to reduce competition in the video distribution and telephone businesses.

- Specific, minimum standards are required to satisfy the regulatory obligations imposed by the Telecommunications Act of 1996.

The first principle, adoption of competitive safeguards, is particularly important. LECs have 100% of the local exchange market. Consumers have no practical alternative for obtaining essential telephone services. In these conditions, there is great potential for anticompetitive conduct where LECs attempt to enter the video business within their telephone service areas.

For example, LECs have the incentive and ability to cross-subsidize their entry into the video business. This will provide them with an unfair competitive advantage over other MVPDs and ultimately will reduce competition in that business. Moreover, the LECs' competitive advantage will be paid for by captive ratepayers in the form of higher rates for local telephone service. The fact that LECs do not dominate the video business does not justify relaxation of regulations that are necessary, because of the LECs' telephone monopoly, to protect telephone ratepayers and to safeguard competition in the video business.

Similarly, LECs may cross-subsidize video delivery for the purpose of reducing potential competition in the telephony business. Competition in local telephony could be reduced because cross-subsidization of LEC video services will effectively limit the resources cable operators may devote to entering the telephone business. Time Warner believes that certain LECs already are using this strategy to target cable operators that have announced an intention to enter the telephony business.

As discussed below, Time Warner believes that the unique monopoly power possessed by LECs justifies a requirement that LECs provide OVS through a separate subsidiary. Similarly, restrictions should be imposed on the ability of LECs to bundle video services with essential telephony services. Obviously, once the market power of a specific telephone company is diminished sufficiently, many of these obligations safely may be relaxed as to that company.

The Commission must also apply the Part 64 cost allocation rules, with certain clarifications, on LEC provision of video services.[2] The Part 64 rules will require LECs to allocate costs between regulated monopoly services and unregulated competitive services. Because Part 64 is well-established and understood by both the LECs and the Commission, it will be relatively easy to administer. Finally, it is imperative that the Commission address cost allocation in this proceeding for a variety of reasons, including the fact that it

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[2] The Commission should note that the competitive safeguards discussed in this pleading should be equally applicable to LEC provision of video services within its local exchange service area regardless of whether they choose to offer video through an OVS or through a franchised cable system. LEC provision of video service outside its local telephone service area is not subject to the same concerns.

will be unable to give adequate attention to these complex issues in the 10 day OVS certification period mandated by Section 653(a) of the 1996 Act.

The second principle is that the Commission must adopt specific, minimum standards for nondiscriminatory access to OVS and just and reasonable and nondiscriminatory rates, terms and conditions. Adoption of specific minimum standards is the only way OVS will fulfill Congressional intent to create a fundamentally different type of MVPD, rather than merely an unregulated cable system. Moreover, the Commission should establish these specific, minimum standards in this proceeding. Rulemaking through case-by-case adjudications will only create confusion, inhibit investment and dilute the obligations required of OVS operators by the 1996 Act.

In short, while Congress in the 1996 Act eliminated the total ban on LEC provision of video in their telephone service areas, it recognized that LEC entry into the video business continued to pose significant and complicated issues. Rather than simply allowing telcos to provide video on an unregulated basis, Congress established a framework that was less restrictive than a total ban, but still retained safeguards necessary to protect competition and telephone ratepayers. The Commission has an obligation to implement OVS in a manner that recognizes the potential for anticompetitive conduct inherent in LEC provision of video and includes restrictions adequate to prevent such conduct.

II. THE FCC SHOULD REQUIRE THAT LECS OFFER OVS SERVICE THROUGH A SEPARATE SUBSIDIARY AND SUBJECT TO THE PART 64 COST ALLOCATION REQUIREMENTS IN ORDER TO RESTRAIN THEIR ABILITY TO CROSS-SUBSIDIZE ENTRY INTO VIDEO.

A. LECs Have The Ability And The Incentive To Cross-Subsidize Video Services.

Two factors give LECs the incentive and ability to subsidize their entry into video with revenues from their monopoly essential telephone services: 1) LECs have a near 100 percent market share in the provision of telephony; and 2) prices for the core telephony services are tied, either directly or indirectly, to the telephone rate base. As described below, absent well-defined safeguards, LECs will systematically attempt to allocate the costs of video services to the regulated rate base. This, in turn, will diminish competition in the video business, and increase consumers' local telephone rates.

It is beyond contention that LECs possess an overwhelming monopoly in the provision of local telephone service. The Commission has recognized that LECs face virtually no competition in the provision of their core telephone business.[3] Moreover, while the competitive access business has been growing, competitive access providers' inroads into the access business have been limited. As the President of Teleport

[3] See Price Cap Performance Review for Local Exchange Carriers, CC Docket Nos. 94-1, 93-124, 93-197, Second Further Notice of Proposed Rulemaking (released September 20, 1995) at ¶ 5 citing Price Cap Performance Review for Local Exchange Carriers, First Report and Order, 10 F.C.C.R. 8962, 8972 (1995) (observing that, while limited competitive entry has occurred, it has been focused in urban areas and marketed mainly toward high volume users).

Communications Group ("TCG") described it in a letter to Chairman Hundt,

> TCG is the largest competitive local carrier in the country and New York is the most competitive local market in the country. Nevertheless, TCG's switched access business in New York State represents less than one-half of one percent of NYNEX's statewide market.[4]

It is equally clear that the LECs core telephone service prices are linked to the telephone rate base. In some states, LECs still are subject to rate of return regulation. Similarly, the Commission continues to apply rate of return regulation to some small LECs. Under these circumstances, where rate of return regulation is applied directly, rates are specifically based on the regulated rate base, plus an administratively determined rate of return.

Many price cap regimes also explicitly tie telephone prices to the regulated rate base.[5] Moreover, all price cap

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4 See Letter from Robert Annunziata, Chairman, President & Chief Executive Officer of TCG to the Honorable Reed Hundt, Chairman, Federal Communications Commission, November 15, 1995 at 1.

5 NYNEX, SNET, US West and GTE (for eight of its study areas) chose the FCC's 4.0% productivity or X-Factor pursuant to which the LECs must share 50% of their return on regulated investments between 12.25% and 13.25% and must share 100% of their return over 13.25%. See Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, Fourth Notice of Proposed Rulemaking (released September 27, 1995) at ¶¶ 7-8. This scheme retains the link between prices and the regulated rate base because the larger the telcos' rate base, the higher it can raise its telephone prices without incurring sharing obligations.

Virtually all state regulatory regimes impose either explicit rate of return regulation or some form of explicit sharing requirements on LECs.

schemes retain an implicit link between telephone prices and the regulated rate base.[6] This is because, under all price cap schemes, including the federal scheme, regulators periodically review LECs' past profitability. If, during such reviews, regulators determine that LEC rates of return on regulated investment are too high or too low, the productivity factor and other elements of the price cap formula are adjusted to bring projected rates of return into compliance with what the regulators view as appropriate.

Moreover, it is unlikely that regulators will ever eliminate the price cap review process. If, for example, it is discovered that LEC profits are very high, regulators will be under substantial public pressure to raise the productivity factor. Alternatively, if LECs' profits are too low or LECs lose money, regulators will feel pressure and, in some cases will be under a legal obligation,[7] to adjust the price ceiling upward.[8]

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6 As Dr. Leland Johnson has described it, price cap regulation essentially amounts to rate of return regulation with a formal time lag. See Declaration of Dr. Leland L. Johnson at 33-34 submitted as Appendix A to Opposition to Direct Case of National Cable Television Association, Inc. in Amendment to the Bell Atlantic Telephone Companies Tariff FCC No. 10, Video Dialtone Service, CC Docket No. 95-145.

7 A regulatory regime that prevents telephone company shareholders from realizing a "return on equity . . . commensurate with returns on investments in other enterprises having corresponding risks" constitutes a regulatory taking under the Fifth Amendment of the United States Constitution. FPC v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944).

8 As Alfred E. Kahn has described it,

> To be sure, we have to my knowledge yet to see a scheme of pure price cap regulation. All of the schemes of which I am aware contemplate review within a few years of how

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Regulation of telephone companies will therefore retain the link between prices and costs for the foreseeable future.

It is the link between consumer prices and the telephone rate base, combined with LECs' substantial and persisting market power in the telephone business, that give LECs the incentive to "game" the regulatory regimes by shifting costs from video services and other unregulated businesses to the telephone rate base. Specifically, by attributing the costs of OVS plant to telephony, telephone companies can avoid any applicable sharing obligations and establish a basis during periodic regulatory reviews for higher prices than otherwise would be permitted. With the costs thus passed on to captive consumers of telephone services, telephone companies can subsidize video activities at the expense of those subscribers.

Moreover, cross-subsidies are particularly difficult for regulators to detect where telephone service shares substantial joint and common costs with the subsidized service. Where telephone companies offer OVS and telephone service over

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> they are working . . . it is difficult to imagine a scheme under which the government would surrender for all time the option of [reviewing the price cap regime]. Such reexaminations have typically involved some correction of the formula if profits prove to be too high or too low -- in which event price regulation turns out to resemble rate of return regulation.

Affidavit of Alfred E. Kahn, Review of Regulatory Framework, Canadian Radio-Television and Telecommunications Commission, Telecom Public Notice CRTC 92-12. Filed on behalf of AGT, April 13, 1993 p.21.

the same physical plant, the two services will share substantial joint and common costs. Without proper regulatory protections, how will the Commission ensure that telephone ratepayers are not forced to pay for the portion of the integrated plant used for video services? If LECs are permitted to use the same employees and equipment to service both telephone and video customers, how will the Commission prevent the improper allocation of these costs to telephony? In short, without proper safeguards, telcos will have the opportunity and the incentive to cross-subsidize a substantial portion of the costs associated with OVS without a significant risk of detection.

B. LECs Also Have The Incentive To Raise Barriers to Competitive Entry In The Local Telephone Business

LEC cross-subsidization not only reduces competition in the video business, it can adversely affect the opportunity of cable operators to enter the telephony business. This, in turn, will reduce competition, consumer welfare and economic efficiency in local telephony.[9]

There is a significant risk that LECs will enter the video business not because they believe such entry will be profitable but in an attempt to limit the resources cable operators will have available to invest in entry into the telephone business. Thus, subsidized LEC video service rates may not only be a means of unfairly capturing customers in the MVPD

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[9] Time Warner believes that, in order to promote telephony competition, the Commission should consider withdrawing or conditioning OVS certifications in cases where the LEC fails to meet its interconnection obligations.

marketplace, but also (and perhaps primarily) as a means of preserving the LEC's local telephone monopoly. In fact, Time Warner believes certain LECs already have embarked upon such a strategy.[10]

C. To Deter Anticompetitive Behavior, The Commission Should Require That LECs Offer OVS Through A Structurally Separate Subsidiary.

The substantial risk that LECs will cross-subsidize their video services, thereby competing unfairly in the video business, inhibiting competitive entry to the local telephone business, and harming monopoly ratepayers, justifies requiring that LECs offer video services through a "structurally separate subsidiary."[11] LECs should be required to maintain maximum separation between their common carrier and OVS operations. This will require the subsidiaries to maintain their own books, records, and accounts; to have separate officers and directors; to use separate operating personnel; to conduct operations separately (including marketing); and to obtain credit separately from the LEC.[12] Agreements for the use of facilities and any

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[10] See, e.g., Haugsted, Linda, "Operators Shrug at PacBell Move From VDT," Multichannel News, Vol. 17, No. 7, at 29 (February 12, 1996). "PacBell is leaving Los Angeles, for now, because the competitive pressure from Time Warner, Cox Enterprises Inc. and TCI is stronger in the San Francisco Bay area, where the telco is focusing its VDT efforts first, and then in San Diego." Id.

[11] As with other regulations necessary due to LEC market power in local telephony, at such time as a LEC's market power is sufficiently diminished, the separate subsidiary requirement could be eliminated.

[12] Credit arrangements with third parties must be without recourse to affiliated corporations, whether "parents" or "siblings."

other transaction would be conducted on an arm's length basis with any transaction reduced to writing and available for public inspection.

A separate subsidiary requirement would limit a LEC's ability to cross-subsidize its video services by preventing "hidden" transactions between its regulated and unregulated businesses. For example, if the video subsidiary purchases capacity from the telephone operating company, the price paid and other details of the transaction will be known. Improper allocation and discrimination will be easier to detect and prevent. Thus, while the LEC may still have the incentive to cross-subsidize, its ability to do so will be restrained.

The Commission can impose a separate subsidiary on LECs providing OVS under its broad Section 653 authority to adopt regulations "consistent with the public interest, convenience, and necessity."[13] In addition, it is clear that the Commission can and should require a separate subsidiary to protect telephone ratepayers from cross-subsidization. Indeed, under Title II the Commission is obligated to ensure that telephone rates are "just and reasonable."[14] Obviously, telephone rates that are inflated

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[13] 47 U.S.C. § 653(a)(1). Section 653(a)(1) does not limit the Commission's public interest authority to the issue of whether non-LECs may provide video programming through an OVS. Rather, it allows the Commission to adopt rules in the public interest, including rules for non-LEC provision of OVS. This reading is consistent with the Commission's other broad grants of authority to regulate in the public interest. <u>See</u> <u>e.g.</u>, 47 U.S.C. § 309(a)(allowing the Commission to grant license applications if the "public interest, convenience, and necessity would be served by the granting thereof.")

[14] 47 U.S.C. § 201. See also 47 U.S.C. §§ 202-205.

in order to subsidize LEC entry into the video business are not "just and reasonable." Similarly, the Commission has authority under Title I to "perform any and all acts, make such rules and regulations, and issue such orders ... as may be necessary in the execution of its functions."[15] This general grant of authority also permits the Commission to establish a separate subsidiary for OVS. The Commission has used this authority in the past to require separate subsidiaries and the exercise of that authority has been upheld by the courts.[16]

Finally, the language of Section 653(c)(3) stating that the OVS "requirements ... shall apply in lieu of, and not in addition to, the requirements of title II," does not preclude application of a separate subsidiary requirement on a LEC providing OVS. In fact, the separate subsidiary is designed to allocate costs to regulated and nonregulated services; it applies <u>because</u> telephone companies providing OVS will be offering both regulated and nonregulated services. The separate subsidiary is a requirement imposed on the LEC as a common carrier with monopoly ratepayers, not on a LEC as an MVPD. In this sense, the

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[15] 47 U.S.C. § 154(i).

[16] <u>See</u>, <u>Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities</u>, Tentative Decision, 28 FCC 2d 291 (1970); Final Decision and Order, 28 FCC 2d 267 (1971), <u>aff'd sub nom.</u> <u>GTE Service Corp. v. FCC</u>, 474 F.2d 724 (2d Cir. 1973); decision on remand, 40 FCC 2d 293 (1973); and <u>see</u>, <u>Policies and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies</u>, 95 FCC 2d 1117, <u>aff'd sub nom.</u> <u>Illinois Bell Telephone v. FCC</u>, 740 F.2d 465 (7th Cir.) <u>aff'd on recon.</u>, FCC 84-252, 49 FR. 26056 (1984), <u>aff'd sub nom.</u> <u>North American Telecommunications Assn. v. FCC</u>, 772 F.2d 1282 (7th Cir. 1985).

requirement should apply to a LEC whether it enters the video business as an OVS operator, a cable operator, or any other type of MVPD.

D. The Commission Also Must Make Clear In This Proceeding The Manner In Which The Part 64 Rules Will Apply To LEC Provision Of Video Service.

The Commission must also apply Part 64 (with certain clarifications and modifications described below) to LECs providing OVS. Given the critical role Part 64 would play in reducing LECs' opportunities to cross-subsidize video services, it is imperative that the Commission establish rules for the specific cost allocation requirements of Part 64 in this proceeding.

Part 64 can help to protect telephone ratepayers from bearing the cost of a telephone company's OVS service in two critically important ways. First, Part 64 provides a cost allocation methodology designed to protect monopoly ratepayers from subsidizing nonregulated services.[17] This is accomplished by categorizing all telephone company investments as either regulated and nonregulated[18] using the Full Allocation Costing methodology. This methodology requires that all costs with either a direct or indirect causal link to regulated or

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[17] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, Report and Order, CC Docket No. 86-111 2 F.C.C.R. 1298, at ¶ 33 (1987), aff'd Southwestern Bell v. FCC, 896 F.2d 1378 (D.C. Cir. 1990) ("Joint Cost Order").

[18] For the purposes of Part 64 all Title II activities are classified as "regulated," and, with certain narrow exceptions, all other activities are classified as "nonregulated." See Joint Cost Order at ¶ 70.

nonregulated activities be directly assigned to the appropriate activity based on relative use. The remaining costs (including overhead costs) are apportioned between regulated and nonregulated activities based upon a general allocator.[19]

Second, the Part 64 rules are designed to prevent telephone ratepayers from bearing the financial risk of imprudent investment in nonregulated services. Thus, under Part 64, network plant investments are allocated between regulated and nonregulated operations on the basis of the use of the plant forecasted over three years. If an investment is made to provide for future nonregulated activities, and these services fail to grow as expected, then the telephone company shareholders bear the risk, not the telephone ratepayers.

Moreover, the allocation of investment based upon forecasted relative use is particularly important considering the fact that many LECs have previously invested in broadband facilities, ostensibly for the purpose of providing telephone services. After having recovered the cost of such upgrades from captive telephone ratepayers, LECs are asserting the right to provide video over such facilities. Properly applied, Part 64 will ensure that conversion of such plant to video use will result in a reallocation of costs to nonregulated services.[20]

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[19] The general allocator is computed by calculating the ratio of all expenses directly assigned or attributed to regulated and nonregulated activities.

[20] Part 64 also requires that labor costs be apportioned between regulated and nonregulated accounts based upon time entries maintained by employees. Time

To be effective, however, the Commission must tailor the existing Part 64 rules to address the particular characteristics of OVS. Most importantly, "relative use" as applied in the Full Allocation Costing methodology in Part 64, must be specifically defined for OVS and any other video entry by LECs. The Commission must determine whether costs should be allocated based on use of capacity, minutes of use, or some other measure. Whatever measure is chosen must further the central goal of Part 64: the protection of ratepayers of regulated services from either subsidizing the prices of nonregulated services or bearing the risk of imprudent telephone company investments in nonregulated services.

Moreover, changes must be implemented and Part 64 applied to LECs offering OVS in this proceeding, before telephone companies are permitted to obtain certification for and commit resources to OVS. If the Commission waits until after OVS providers have been certified, changes subsequently required by the application of Part 64 will meet with complaints of unfairness and assertions that the OVS providers have already begun construction in reliance on allocation rules applicable at the time of certification.

The Commission also must require LECs to make any necessary revisions to their cost allocation manuals ("CAMs") and

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must be reported in increments of one hour or less. This will help prevent LECs from providing video installations and other construction services at the expense of monopoly ratepayers.

obtain Commission approval for those changes prior to OVS certification. The statutory 10 day time frame for OVS applications will not give the Commission adequate time to evaluate CAM revisions for OVS. After-the-fact review of CAMs will, as a practical matter, significantly limit the Commission's discretion to correct the relevant CAM revisions for the reasons described above. Telephone companies must therefore comply with the requirements of Part 64 before applying for OVS certification. Any other rule will render Part 64 largely unenforceable.

In addition, the cost allocation safeguards established in Part 64 and modified in this proceeding must be viewed as the minimum requirement necessary for LEC OVS certification. LECs certifying compliance with the Commission's OVS rules also should be required to demonstrate that its projected revenues will recover at least the long run incremental cost of providing service. This will help ensure that the prices established by LECs are subsidy-free.

Finally, the Commission's authority to impose Part 64 on the LECs in order to protect captive telephone ratepayers is established under the same provisions of the Act, described above, which authorize the Commission to impose a separate subsidiary requirement for OVS.

III. THE COMMISSION MUST ADOPT SAFEGUARDS TO LIMIT LEC ABILITY TO LEVERAGE THEIR EXTANT TELEPHONE MONOPOLY, THEREBY INHIBITING COMPETITION IN THE MVPD MARKETPLACE.

Notwithstanding the 1996 Act, LECs face practically no competition in their core local telephone business. LECs have numerous opportunities to leverage their monopoly into other markets. The cross-subsidy opportunity discussed above is one such opportunity, but it is far from the only opportunity. Other opportunities include bundling competitive services with monopoly services and the use of inbound telemarketing.

In the Notice, the Commission seeks comment on the extent to which it should regulate bundled packaging of services by an OVS operator and joint marketing of such services.[21] Until such time as LEC market power in local telephony is diminished, the Commission should prohibit LECs from bundling services and from marketing such services jointly in their telephone service areas. The primary danger associated with LEC bundling of services is that it could offer the bundled service at such a steep discount when compared to its unbundled price that rational consumers are effectively precluded from purchasing the services separately. Because most residential consumers will only have access to LEC telephone service in the near future, LECs will possess a significant opportunity to leverage their telephone monopoly into competitive markets. Exercise of market power in this manner will inhibit competition, rather than promote it.

A similar problem is associated with LECs using inbound telemarketing. Inbound telemarketing occurs when a company receives a consumer contact with regard to one service, and then uses that contact to market other services. When most people relocate, the first communication service they initiate is

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[21] Notice at ¶ 66.

telephone service. This gives the LEC opportunity to market its competitive services, such as video, well in advance of its competitors. This advantage, which flows from LECs' long-standing and persisting local monopoly, should be curtailed.

IV. THE COMMISSION MUST AFFIRMATIVELY ESTABLISH MINIMUM STANDARDS TO ASSURE NONDISCRIMINATORY ACCESS AND REASONABLE RATES, TERMS AND CONDITIONS FOR OVS.

A. Congress Established OVS To Be A Functionally Different Type Of MVPD, Not Simply An Unregulated Cable System.

The 1996 Act establishes OVS as a new type of MVPD with materially different opportunities and obligations from existing MVPDs.[22] For example, the Act stipulates that "with respect to the establishment and operation of an open video system, the requirements of this section apply in lieu thereof, and not in addition to, the requirements of title II."[23] Similarly, it eliminates for OVS many significant Title VI obligations, including the need to obtain or renew a franchise, and end user rate regulation.

In exchange for this sweeping regulatory relief, Congress mandated that the Commission impose on OVS operators an alternative, fundamentally different set of obligations. These include: (1) a nearly absolute prohibition against discrimination among video programming providers with regard to access to the OVS; (2) an obligation to offer access under rates, terms and conditions which are just and reasonable and not unjustly and

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[22] Indeed, the Commission recognizes that "[s]ection 653's open video system option entails an entirely new framework for entering the video marketplace." Notice at ¶ 4.

[23] 47 U.S.C. § 654(c)(3).

unreasonably discriminatory; (3) a limitation on an OVS operator's (or its affiliate's) ability to select programming if demand for capacity exceeds supply; and (4) a prohibition against discrimination "with regard to material or information (including advertising) provided by the operator to subscribers for the purpose of selecting programming on the OVS."[24]

These obligations are not discretionary. The Commission "shall complete all actions necessary. . . to prescribe regulations that . . . prohibit an operator from discriminating. . . and ensure that the rates, terms, and conditions for such carriage are just and reasonable."[25] Unless OVS obligations are meaningful and clearly understood at the outset, OVS will not be a new type of MVPD as Congress intended, but merely an unregulated cable system. Providing OVS operators with all the rights associated with the OVS regulatory model, but none of the responsibilities would clearly contravene Congressional intent.

B. The Commission Must Define And Establish OVS Responsibilities In This Rulemaking, And Not On An Ad Hoc Basis.

The Commission seeks comment on the propriety of establishing "general" OVS requirements to be enforced through an

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24 47 U.S.C. § 653(b)(1)(E)(i).

25 47 U.S.C. § 653(b)(1)(A).

ad hoc complaint procedure.[26] An ad hoc procedure would not serve the public interest. Specific, enforceable OVS requirements should be adopted in this rulemaking. This is so for three reasons. First, in the absence of standards adopted in this rulemaking, the Commission cannot meaningfully approve or deny OVS certifications within the 10-day time frame. Second, if LECs construct OVS networks without established standards, the Commission may be hesitant to reach decisions which adversely impact the LECs' investment. Third, establishing standards in a rulemaking promotes stability and avoids imposing the cost of establishing standards on individual litigants in a complaint process.

1. Adopting Specific OVS Regulations In This Proceeding Would Serve The Public Interest

Establishing specific OVS regulatory standards through a rulemaking process offers significant benefits. First, by adopting specific, practical, long-term rules in this proceeding, the Commission will provide regulatory certainty and stability. Both potential OVS providers and unaffiliated programmers need OVS regulations in place prior to making investment decisions. For example, potential OVS operators need to know the specific extent of their obligation to offer capacity to unaffiliated programmers, and potential programmers need to understand their

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[26] See, e.g., Notice at ¶ 12 (seeking comment on establishing a general nondiscrimination requirement enforced on a case-by-case basis); Notice at ¶ 31 (seeking comment on whether negotiated carriage rates subject to a complaint procedure would result in just and reasonable rates).

rights and obligations before they can assess the value of such a service.

After a number of case-by-case adjudications, investors may begin to discern generally applicable regulatory requirements, but by that time investment decisions have been made by both parties, and costs are sunk.[27] The Commission can considerably enhance investment decisions regarding OVS by minimizing such regulatory risk; the only way to do this is to adopt specific, enforceable regulations at the outset.

Second, establishing specific OVS regulations and standards in this rulemaking will appropriately apportion the burden of establishing such regulations. In a rulemaking proceeding, the video programming and delivery industry at large bears the burden of identifying the key regulatory needs and providing the Commission guidance as to how those needs should be addressed. On the other hand, a case-by-case adjudication procedure substantially shifts this burden from the video programming and delivery industry to individual litigants, thereby creating regulatory free-riders.

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[27] Even then, the full scope of the regulatory obligations facing similarly-situated parties may not necessarily be known, because no one case can represent the broad spectrum of factual situations in which these disputes will arise. In a rulemaking proceeding, industry participants have an opportunity to apply the proposed rules to their situations and provide guidance to the Commission on its probable impact.

2. **In The Absence Of Minimum Specific Standards Adopted In This Proceeding, The Commission Cannot Meaningfully Approve Or Deny Certifications Within The Statutory 10-Day Time Frame**

Section 653(a) requires that the Commission "act to approve or disapprove"[28] any OVS operator certification within 10 days "after receipt of such certification."[29] In such an abbreviated time frame, the Commission cannot expect to ascertain on an ad hoc basis whether and to what extent an OVS system meets the statutory requirements unless it has already established clear guidelines in this proceeding.[30]

This is so for a number of reasons. First, in the absence of specific regulations, there are too many complex issues to be meaningfully resolved in 10 days. These issues include cross-subsidy concerns, discrimination, channel allocation, and pricing, among others. The Commission simply will not be able to impose application-specific obligations in so little time.

Second, without specific obligations, the Commission will be unable to ascertain whether the approach adopted by each operator meets the statutory requirements. If the Commission's experience with video dialtone is any guide, different operators

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28 47 U.S.C. § 653(a).

29 Id.

30 Indeed, the statutory language, which requires that the operator certify that it "complies with the Commission's regulations under subsection (b)," intuitively presupposes that such compliance presently exists, i.e., the operator is not required to certify that it **will** comply (if called upon), but that it **does** comply.